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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SCANDINAVIAN-AMERICAN BANK,
a corporation,
Petitioner and Appellant,

vs.

R. L. SABIN, Trustee of the Estate
of D. Sondheim, Bankrupt,
Trustee and Respondent.

In the Matter of D. Sondheim, Bankrupt.

BRIEF OF PETITIONER AND APPELLANT

Petition for revision of and appeal from a certain order and judgment of the United States District Court for the District of Oregon.

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STATEMENT OF THE CASE.

This is a controversy between R. L. Sabin, as Trustee of the estate of D. Sondheim, Bankrupt, on the one hand and the Scandinavian-American Bank, on the other hand, over the ownership of a stock of merchandise. The Trustee in Bankruptcy claims the prop-

erty as part of the bankrupt estate. The Bank claims the property through possession of it secured before the levy of any creditor and before the filing of the petition in involuntary bankruptcy, and by virtue of an agreement entered into with Sondheim.

The facts are not in dispute.

On or about October 23, 1914, D. Sondheim, the bankrupt, whose business was buying and selling bankrupt stocks of merchandise, applied to the Scandinavian-American Bank for the sum of $2600 to enable him to purchase the bankrupt stock of merchandise known as the D. N. Pallay stock. He represented that this stock could be secured for $5680 of which he lacked the sum of $2600. He proposed that if the Bank would make the necessary advance, the merchandise would be held to protect it absolutely against loss on the sum advanced and on existing indebtedness which amounted at that time to the sum of $2600. The Bank accepted his proposal and an agreement was thereupon executed in which it was recited among other things, "that the Scandinavian-American Bank has furnished to D. Sondheim the sum of $2600.00 to be used to purchase the goods, wares, and merchandise of the store located at No. 146 Sixth St., Portland, Oregon, under an agreement to protect the said party of the second part absolutely on said purchase," . . . . and "that the said D. Sondheim holds title to the same as trustee for the said party of the second part, in so far as the holding of said title is necessary to pay the party of the second part the sums of money owing by the party of the first part to the party of the second part," and "that

D. Sondheim shall keep an accurate account of each day's sales, and one-half of the moneys taken in for the sale of said goods in the course of each day, shall be turned over to the party of the second part at the opening of its banking hours the following day, until such time as the $2600 advanced by the party of the second part and any other indebtedness to the extent of $2600 owing by the party of the first part to the party of the second part shall have been fully paid and satisfied."

The stock of merchandise was thereupon purchased and the store opened. In lieu of the payment of one-half of the proceeds of the daily sales, Mr. Sondheim agreed in order to save the Bank bookkeeping that he would make weekly payments of $500 until the entire indebtedness was discharged, and he authorized the Bank in the event that these payments were not made to charge his checking account.

Pursuant to this understanding, on Nov. 2, 1914, Mr. Sondheim made a payment of $500; on November 12, 1914, his checking account with the Bank was charged in the sum of $365 and on November 13, 1914, in the sum of $195, and on that day on account of his failure to make the agreed payments, the Bank took possession of the stock of merchandise and sold it at retail for a period of ten days until restrained by an order of the District Court.

Three days after the Bank had taken possession of the merchandise proceedings in involuntary bankruptcy were instituted and shortly thereafter a petition was filed asking the Court to direct the Bank to turn

over this stock of goods as part of the bankrupt's estate.

The petition among other things alleged that the merchandise was claimed by the Bank under and by virtue of a certain instrument of writing which was in effect and in fact a mortgage and under which said mortgage the Bank took possession of the stock Friday, Nov. 13, 1914; that the said mortgage or agreement was not recorded nor acknowledged so as to entitle it to record and that it was, therefore, void as to creditors of the bankrupt; that the Bank refused to deliver possession of said stock.

The Bank answering the petition alleged in substance that under and by virtue of the agreement entered into with Sondheim and the understanding and intention of the parties, the title to the stock of merchandise at all times remained in it, and that prior to a levy by any creditor and prior to the filing of the petition in involuntary bankruptcy, the possession of the merchandise was surrendered to it; that it acted in good faith in all its dealings with Sondheim upon a sufficient consideration and without any intent to hinder, delay or defraud any creditor of said D. Sondheim.

Upon the issues raised by the pleadings the matter was referred to Mr. A. M. Cannon, as Special Master, to take testimony and report his findings and conclusions to the Court. In the meantime pursuant to a stipulation entered into between the Trustee and the Bank and approved by the Court, the stock of merchandise was sold and the net proceeds realized therefrom in the sum of $3,476.70, deposited in the Scandinavian-

American Bank to abide the decision of the Court as to the ownership of the merchandise.

The Special Master after hearing the evidence adduced at the hearing, reported that the agreement with Mr. Sondheim did not constitute a contract of conditional sale or create a trust; that it amounted to a chattel mortgage and was void because it was not recorded and because it permitted Mr. Sondheim to remain in possession of the merchandise as apparent owner, selling it at retail. The Special Master also found that the Trustee had ample power and authority to maintain this proceeding, notwithstanding the fact that the Bank had possession before the lien of any creditor attached and before the filing of the petition in involuntary bankruptcy. He also found, and this is highly important, that the Bank entered into the agreement with Sondheim in good faith and with no actual intent on its part to hinder, delay or defraud any creditor of the bankrupt.

To the conclusions of the Special Master, that the agreement did not constitute a contract of conditional sale or create a trust, and that it was a chattel mortgage, void under the laws of the State of Oregon, and that the Trustee had ample power and authority to maintain this proceeding, the Bank duly excepted and from the orders of the District Court overruling its exceptions, prosecutes this appeal.

SPECIFICATION OF ERRORS

The following are the specifications of error relied

upon by the appellant and which are intended to be urged upon this appeal. This specification of errors is the same as the assignment of errors (Transcript, page 82).

Petitioner and appellant believes and alleges the orders and decrees of the District Court to have been erroneous in that:

1. The Court overruled its exceptions to the Special Master's report.

2. The Court failed to sustain its exceptions to the Special Master's report.

3. The Court confirmed the report of the Special Master and further ordered that this Bank pay to the Trustee the sum of $1,000.43, and the costs and disbursements of the proceedings.

4. The Court confirmed the report of the Special Master, holding the agreement in controversy did not amount to a contract of conditional sale, or a trust receipt.

5. The Court confirmed the report of the Special Master, holding the agreement in controversy void as a chattel mortgage under the laws of the State of Oregon.

6. The Court confirmed the report of the Special Master holding that the possession of the property by this Bank prior to a levy by any creditor and prior to the filing of the petition in involuntary bankruptcy did not entitle this Bank to hold said goods until its indebtedness was repaid.

7. The Court confirmed the report of the Special

Master holding that the Trustee could question this conveyance.

The Court made and entered the following orders and decrees:

> "This cause was heard upon the exceptions of the Scandinavian-American Bank to the report of Mr. M. A. Cannon, Special Master herein, upon the petition of the receiver to require said Scandinavian-American Bank to turn over certain property or the proceeds thereof to the bankrupt estate, and was argued by Mr. Sidney J. Graham, of counsel for said Scandinavian-American Bank and by Mr. Sidney Teiser, of counsel for the Trustee of said bankrupt. On consideration whereof it is ordered that said exceptions be and the same are hereby overruled; that the report of the Special Master be, and the same is hereby affirmed, and that the Scandinavian-American Bank be, and it is hereby ordered and directed to turn over to the Trustee herein, the property or proceeds thereof as prayed for in the petition of said Trustee."

And on the 21st day of May, 1915, omitting certain recitals therein, the following order and decree:

> IT IS ADJUDGED, ORDERED AND DECREED that the exceptions to the Special Master's report be, and the same are hereby overruled.
>
> AND IT IS FURTHER ADJUDGED, ORDERED AND DECREED that the Scandinavian-American Bank pay unto R. L. Sabin, trustee herein, upon surrender of the cashier's check held by him in the amount of $3,-

476.70, the said sum of $3,476.70, and the further sum of $1,000.43, said latter amount being the net proceeds of sale realized by the Scandinavian-American Bank from the sale of property by it prior to the injunction order of this court and the taking possession by said R. L. Sabin of said property under said stipulation and order heretofore mentioned.

AND IT IS FURTHER ADJUDGED, ORDERED AND DECREED that the amount due by said Scandinavian-American Bank to Julius Efteland for ten days' services, as set forth herein, less the amount of $36.40 paid him by said Bank, be, and the same is hereby a lien upon the funds in the hands of the trustee herein, and said trustee is directed to pay to the said Julius Efteland the amount due him by said Bank.

AND IT IS FURTHER ADJUDGED, ORDERED AND DECREED that said Scandinavian-American Bank pay unto said R. L. Sabin, trustee, interest at the rate of 6% per annum from the date of this decree upon said moneys, together with costs and disbursements herein."

The errors here specified in various forms may be summarized as follows:

1. Error in overruling the exception to the conclusion of the Special Master that the agreement in controversy did not constitute a contract of conditional sale or create a trust.

2. Error in overruling the exception to the conclusion of the Special Master that the agreement was in effect a chattel mortgage and void under the laws of the State of Oregon.

3. Error in overruling the exception to the conclusion of the Special Master that the trustee in bankruptcy had authority to maintain this proceeding.

POINTS AND AUTHORITIES.

I.

Under the terms of the agreement the title to the merchandise remained in the Bank.

Agreement between Sondheim and the Bank. (Transcript of record, pages 28 to 31.)

Testimony of the cashier of the Bank. (Transcript of record, page 51.)

Black on Bankruptcy, page 807, Sec. 564.

Loveland on Bankruptcy, Vol. I, page 843.

In re Cattus, 183 Fed. Rep. 733.

Charavay & Bodin vs. York Silk Mfg. Co., 170 Fed. 819.

Century Throwing Co. vs. Mueller, 197 Fed. 252.

II.

Considered as a chattel mortgage the agreement is valid under the laws of the State of Oregon.

(a) A mortgagor may remain in possession of mortgaged property, selling it at retail, without rendering the mortgage void.

Currie vs. Bowman, 25 Ore. 364.

Sabin vs. Wilkins, 31 Ore. 450.

(b) The presumption of fraud raised by Section 799 L. O. L. is a disputable one and is overcome by evidence that a mortgage is executed in good faith and for a valuable consideration.

Sub. 40, Sec. 799, L. O. L., which reads as follows:

> "Every sale of personal property, capable of immediate delivery to the purchaser, and every assignment of such property, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller or assignor, during his possession, or as against subsequent purchasers in good faith and for a valuable consideration, disputable only by making it appear on the part of the person claiming under such sale or assignment that the same was made in good faith for a sufficient consideration, and without intent to defraud such creditors or purchasers; but the presumption herein specified does not exist in the case of a mortgage duly filed or recorded as provided by law."

Marks v. Miller, 21 Ore. 317.

Davis v. Bowman, 25 Ore. 189, 35 Pac. 264.

Report of Special Master (Transcript of Record, page 36).

Opinion of District Judge (Transcript of Record, page 79.)

(c) Possession of mortgaged property by a mortgagee under an unrecorded chattel mortgage before the

lien of any creditor attaches makes such a mortgage good against every one.

Jones on Chattel Mortgages, section 178.

Watson vs. First National Bank of Clarkston, 143 Pac. 451.

Cook vs. Cooper et al., 18 Ore. 142, 22 Pac. 945, 7 L. R. A. 273.

Martin vs. Halloway, 16 Idaho 513, 102 Pac. 3.

Martin vs. Sexton, 112 Ill. App. 199.

Williams vs. Miller, 6 Kan. App. 626, 49 Pac. 703.

(d) Even without a change of possession, an unrecorded mortgage given in good faith is good against every one but subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property.

Section 7407, L. O. L., which reads as follows:

> "Every mortgage, deed of trust, conveyance, or instrument of writing intended to operate as a mortgage of personal property, either alone or with real property, hereafter made, which shall not be accompanied with immediate delivery and followed by the actual and continual change of possession of the personal property mortgaged, or which shall not be recorded as provided in section 7405, shall be void as against subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property, or any portion thereof."

Williams vs. First National Bank, 48 Ore. 571.

III.

The Trustee is without authority to maintain this proceeding.

Sec. 47a, Amendment of 1910 to Bankruptcy Act.

Collier on Bankruptcy, 10th Ed., page 662b.

In re Flatland, 196 Fed. 310 (C. C. A. 9th Cir.).

ARGUMENT.

I.

Under the terms of the agreement the title to the merchandise remained in the Bank.

The language of the agreement and the intention of the parties determine whether it is a contract of conditional sale or a chattel mortgage. The agreement recites that the Bank has furnished D. Sondheim the sum of $2600 to be used to purchase the merchandise at No. 146 Sixth Street, under an agreement to protect the bank absolutely on said purchase and that the merchandise was purchased with money furnished by the party of the second part, that is the Bank, and that the said D. Sondheim holds title in the same as Trustee for the said party of the second part in so far as the holding of the title is necessary to protect and pay back to the party of the second part the sums of money owing by the party of the first part to the party of the second part. The cashier of the Bank testified:

> "Mr. Sondheim said that we would have the title but he wanted to handle the goods, to look after the managing part of it. After we were paid $5200 then he would get the title back to the stock and we would have nothing to do with it. That was the understanding." (Transcript of Record, page 51.)

This testimony is uncontroverted. The language of the agreement construed in its light is clear and plain. The title remained in the Bank and under the authority of the decision of this Court in Meier & Frank vs. Sabin, the record of a contract of conditional sale is unnecessary under the laws of the State of Oregon.

But even if the agreemnt did not constitute a contract of conditional sale in the strictest sense, it created such a relation between the parties that the Bank is entitled to hold the merchandise until its indebtedness is repaid. It is not an unusual transaction for a banker to make advances to a merchant to enable him to purchase a stock of goods, and Federal and State Courts are in unanimity in upholding such a transaction. In re Cattus, 183 Fed. 733, illustrates this. Here the banker made advances to a merchant to enable him to import a stock of merchandise and the merchant executed an agreement which contained inconsistent declarations regarding the title to the merchandise. Circuit Judge Ward, in rendering the opinion of the Court, among other things says:

> "The purpose of the parties, describe the trust receipt as you will, was to keep the title to the goods in the bankers until their acceptances for the price of the goods

> were paid. The courts without always defining exactly what the relations between the parties is, or always defining it in the same way, still are astute to protect the rights of the banks in such cases."

It is true that in this case the Bank furnished the entire consideration for the purchase of the merchandise, but whether a Bank advances all or but a portion of the purchase price should not affect the principle.

Mr. Black in his work on bankruptcy, page 807, says:

> "Where a bank or an individual advances money to a merchant to enable him to buy or import a stock of goods, and the merchant executes a trust receipt, by which he agrees to hold the goods in trust for the one so advancing the funds and as the latter's property, but with liberty to sell the same in the course of trade and binding him to pay over the proceeds of such sales as fast as received until the advances are repaid, the title to the goods before repayment does not vest in the merchant in such sense that they will be assets of his estate in bankruptcy, but the cestui que trust will be entitled to reclaim the goods from the trustee in bankruptcy, or the proceeds if sold."

The Scandinavian-American Bank advanced the money to enable Sondheim to make the purchase of the stock of merchandise. He executed a trust receipt. He understood and the Bank understood that the title to the merchandise remained in the Bank until the indebtedness was repaid. He made payments on this indebtedness. Under these circumstances the title to

the merchandise did not vest in the Trustee in such sense that the merchandise can be claimed as part of the bankrupt estate.

II.

CONSIDERED AS A CHATTEL MORTGAGE, THE AGREEMENT IS VALID UNDER THE LAWS OF THE STATE OF OREGON.

(a) *A mortgagor may remain in possession of mortgaged property, selling it at retail, without rendering the mortgage void.*

This point has been before the Supreme Court of the State of Oregon in several cases. The first decisions rendered by that court appeared to hold a chattel mortgage invalid which permits a mortgagor to remain in possession of the mortgaged property, selling it at retail. An examination of these cases, however, shows that either actual fraud was present in the execution of the mortgage, or that aside from permitting the mortgagor to remain in possession of the mortgaged premises, the mortgage was for the benefit of the mortgagor.

In Orton vs. Orton, 7 Ore. 748, for example, the mortgagor applied the proceeds realized from the daily sales to his own use. In Bremer & Co. vs. Fleckenstein & Mayer, 9 Ore. 274, the Court says: "We find the mortgagor in reality under no more restraint than if the mortgage had not been in existence." In Pierce vs. Kelley, 25 Ore. 95, cited in the report of the Special Master, a creditor had secured a lien by attachment upon

the property before there had been a sufficient change of possession.

In these essential particulars the early cases differ from the present case. Here we have a possession by Sondheim of but three weeks, an agreement entered into in good faith, a provision for the payment of one-half of the proceeds realized from the daily sales later modified in order to save bookkeeping to weekly payments of $500, three payments actually made, one in the sum of $500, one in the sum of $365 and one in the sum of $195, no creditor with a lien upon the property, and possession taken by the Bank.

The later decisions fully uphold the right of a mortgagor to remain in possession of the mortgaged property selling it at retail. The court first reaches this conclusion in Currie vs. Bowman, 25 Ore. 364. This was a suit brought by Currie as Receiver to have certain chattel mortgages delivered to the defendant Bowman declared invalid. It appears from the opinion that the DuRand Piano Company, the mortgagor, was practically insolvent at the time that the mortgages were executed and that while they were recorded the Recorder was requested not to give that fact out for publication in the official abstract. It further appears that the mortgagor remained in possession selling at retail for a period of about twenty days when the mortgagee took possession of the stock. The Supreme Court in reversing the judgment of the lower Court holds the mortgages valid and declares that in order to avoid a mortgage there must be a real design on the part of the mortgagor in which the mortgagee participates to with-

draw the property from the claims of creditors, and that if the mortgage is accepted in good faith there is not a fraudulent hindrance because the property is not disposed of in a way to prevent its application to the satisfaction of bona fide debts.

In Sabin vs. Wilkins, 31 Ore. 450, the court again upholds a chattel mortgage which permits the mortgagor to remain in possession selling at retail. This was a creditors' suit to have a chattel mortgage adjudged void on the ground that it allowed the mortgagor to retain possession of the mortgaged property, a stock of merchandise, and sell and dispose of it in the usual course of trade for his own use and benefit. Justice Wolverton, now Federal Judge, in rendering the opinion of the Court setting aside the judgment of the lower court, says:

> "The creditors can only complain when the mortgage is executed or subsequently used as a shield for the special benefit of the mortgagor and thereby hinders or delays due process of law in reaching the property, and subjecting it to the payment of valid demands. The mere fact that it may lessen their chances of realizing their claims in full does not of itself render the transaction fraudulent, if the mortgage is otherwise fair and so treated; but it is the erection of a false muniment, not intended to secure the mortgagee so much as to ward off and defeat just demands that works the iniquity and to avoid which the law affords a remedy."

These decisions leave no doubt as to the right of a mortgagor to remain in possession of mortgaged prop-

erty selling it at retail, and this is the chief objection raised by the Trustee to the present agreement. They clearly establish that it is not a question of whether the mortgagor or the mortgagee is in possession of the mortgaged property, but that it is a question of whether the mortgage is given in good faith and to secure a bona fide debt. This agreement was given in good faith and to secure a bona fide debt. This is the undisputed testimony; this is the finding of the Special Master. The objection of the Trustee is without merit. The possession of Sondheim did not invalidate the agreement.

(b) *The presumption of fraud raised by Section 799, L. O. L., is a disputable one and is overcome by evidence that a mortgage is executed in good faith and for a valuable consideration.*

Section 799, L. O. L., provides in substance that every mortgage of personal property, unless it be accompanied by an immediate delivery or unless the mortgage be recorded, creates a presumption of fraud as against creditors and subsequent purchasers in good faith and for a valuable consideration, disputable only by making it appear that the same was made in good faith for a sufficient consideration and without intent to defraud such creditors or purchasers. Construing this section in Marks vs. Miller, 21 Ore. 317, the Court says:

> "Hence, a chattel mortgage under our statute, given in good faith, although not filed, is valid as against creditors and subsequent purchasers . . . . . It is true in the earlier decisions the presumption of fraud from possession was held to

> be conclusive, but the later and better considered cases hold that the fact of possession by the mortgagor is only prima facie a badge of fraud; that it may be rebutted by explanation showing the transaction to be fair and honest and consistent with the terms of the contract; and that the presumption of fraud arising from the circumstances of such possession is not an absolute inference of law but one of fact for a jury."

In Davis vs. Bowman, 25 Ore. 189, 35 Pac. 264, the Court says:

> "As to such mortgages, not recorded or filed, there is a presumption of fraud which, unexplained, leaves them invalid, but which when explained, removes such presumption and leaves them intact and valid."

In the light of these decisions, it is clear that evidence of good faith overcomes the presumption of fraud. The cashier of the Bank testified to the circumstances attending the execution of the agreement. He detailed the conversation of the parties; he showed that $2600 was owing to the Bank on prior loans and that the further sum of $2600 was advanced to purchase the stock of merchandise. He explained why Sondheim was permitted to remain in possession. Upon his uncontroverted testimony the Special Master made a finding that the agreement was entered into in good faith. This effectually overcomes the presumption of fraud and leaves the agreement valid and binding.

(c) *Possession of mortgaged property by a mortgagee under an unrecorded chattel mortgage before the*

lien of any creditor attaches, makes such a mortgage good against every one.

The decisions are numerous on this point. A few citations will indicate the effect of possession.

In Watson vs. First National Bank of Clarkston, 143 Pac. 451, the Supreme Court of the State of Washington says:

> "Where the mortgagee takes possession of the property conveyed by an unrecorded chattel mortgage, the mortgage speaks as of the date when the possession was taken. From that time the mortgage is valid as to all creditors who have not prior thereto acquired a right to the specified property or a lien thereon."

In Cook vs. Cooper, et al., 18 Ore. 142, 22 Pac. 945, 7 L. R. A. 273, the Court says:

> "It results, therefore, that while a mortgagee is not permitted to maintain a possessory action to recover the mortgaged premises by reason of the default of the mortgagor, still, if he can make a peaceable entry upon the mortgaged premises after condition broken, he may do so, and may maintain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of his debt. This view of the law in no manner interferes with the just rights of the mortgagor and at the same time it does not sacrifice the interest of the mortgagee to the merest technicalities of the law which have sometimes been permitted to prevail and the mortgagee turned out of possession, stripped both

of the property and his mortgage debt as well."

Jones in his work on Chattel Mortgages, section 178, says:

"If a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody. If it was previously valid between the parties although it be not aeknowledged and recorded or the record be ineffectual by reason of any irregularity, the subsequent delivery cures all such defects and it also cures any defect there may be through an insufficient description of the property. The delivery of possession under a mortgage before rights have been acquired by others will cure any invalidity there may be in the instrument whether arising from an insufficient description of the property and insufficient execution of the instrument, the omission to record it, or from its containing a provision which makes it void except as between the parties, as for instance an agreement that the mortgagor may retain possession and sell a stock of goods in the usual course of trade."

In Martin vs. Halloway, 16 Idaho 513, 102 Pac. 3, the Supreme Court of Idaho in a well considered case, says:

"We believe that where a chattel mortgage is valid between the parties, even though for some reason it be void as to creditors, that if the property be delivered to the mortgagee prior to the time any specific right or lien upon the property is

> acquired by a creditor, the possession of such mortgagee is valid."

The evidence discloses and it is undisputed that the Bank secured possession of the merchandise November 13th, 1914, a period of but three weeks after the date of the execution of the agreement. The evidence also discloses and it is undisputed, that the possession was taken before the lien of any creditor had fastened upon the merchandise and before the filing of the petition in involuntary bankruptcy. This entitled the Bank to hold the property until its indebtedness was repaid.

(d) *Even without a change of possession, an unrecorded mortgage given in good faith is good against every one but subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property.*

Section 7407, L. O. L., provides in substance that every chattel mortgage which shall not be accompanied by immediate change of possession or which shall not be recorded shall be void as against subsequent purchasers and mortgagees in good faith and for a valuable consideration. The statute does not say that such a mortgage shall be void against all creditors. Its operation is limited to subsequent purchasers and mortgagees in good faith and for a valuable consideration. This is the construction placed upon the statute by the Supreme Court of the State and it is fatal to the Trustee's case. In Williams vs. First National Bank, 48 Ore. 571, 87 Pac. 890, this point was before the Court. It appeared in that case that one Wickersham executed and delivered a chattel mortgage to the plain-

tiff which was not acknowledged and which the Court treated as an unrecorded mortgage; that subsequently Wickersham executed and delivered a chattel mortgage to the defendant covering the same property; that the defendant's chattel mortgage was duly recorded and that he had notice of the prior mortgage of the plaintiff. Upon appeal the defendant contended that an unrecorded mortgage which did not strictly conform to the provisions of the statute was void as to subsequent mortgagees and third parties, even though they had notice of its existence. Answering this contention the Court says:

> "In support of this claim several cases are cited from other states, based upon statutes which were found upon examination to make no limitation upon the character of third persons against whom an unrecorded mortgage is declared void and are radically different from our statute which expressly declares that such mortgages 'shall be void against subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property.' The effect of this statute is to limit its operation to the classes mentioned, and clearly implies that such a mortgage is valid as to all others without being recorded."

In the light of this decision and the direct and positive language of the statute it is clear that only subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same property can question a chattel mortgage executed in good faith, even though it is not recorded and even though the mort-

gagor remains in possession. The trustee in bankruptcy is neither a subsequent purchaser nor a mortgagee. He stands in the position of the creditors. They fastened no lien upon this property. They were neither subsequent purchasers nor mortgagees of it within the requirements of the statute. They could not set this agreement aside. The trustee cannot do what they could not do.

III.

THE TRUSTEE IS WITHOUT AUTHORITY TO MAINTAIN THIS PROCEEDING.

The amendment of 1910 to the Bankruptcy Act confers upon the Trustee with respect to property not in the custody of the bankruptcy court, only the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied. This establishes no lien upon personal property, and unless some creditor had secured a lien the Trustee secures no greater rights in the property than the bankrupt had. Discussing this amendment, Mr. Collier in his recent work on Bankruptcy, at page 662b, says:

> "If none of the creditors of the bankrupt had a lien by judgment, or otherwise, against the property in question, the amendment does not increase the Trustee's rights but as to such property he stands in the shoes of the bankrupt."

In support of this conclusion the author cites In re Flatland, 196 Fed. 310. This was a case recently decided by this Court in which it appears that one Mann

had advanced money to the bankrupt to purchase certain goods and fixtures; that immediately upon the advancement of the money the bankrupt executed a chattel mortgage; that at the time the mortgage was executed the goods were not in existence, but that thereafter the goods were purchased with the money which Mann had advanced. Counsel for the petitioner contended that while the mortgage was good between the parties, it was not good against the Trustee; that under the amendment of 1910 the Trustee did not stand in the shoes of the bankrupt but had all the rights of a creditor possessing a levy upon the property in controversy; and that if the lien of the chattel mortgage would not for any reason be valid as against a levying creditor, it would not be valid against the Trustee. Answering this contention, the Court says that "a conclusive answer to the suggestion here made is that there is nothing in the record showing that any of the creditors of the bankrupt other than the respondent, held any lien of any character." The Court then quotes with approval from In re Chase, 124 Fed. 753, 755; 59 C. C. A. 629, 631:

> "It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant. Williams' Law of Bankruptcy (7th Ed.) 191. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or

> the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery."

Under the admitted facts of the present case this decision is conclusive. The Bank secured possession of the stock of merchandise before the filing of the petition in involuntary bankruptcy. No creditor acquired a lien. It continued in that possession. So far as Sondheim was concerned, the agreement was unquestionably binding, and if binding upon Sondheim, it is binding upon the Trustee. He is clearly without authority to maintain this proceeding.

CONCLUSION.

The agreement with Sondheim was entered into in good faith. The sum of $2600 was advanced by the Bank and used to purchase the goods in controversy. The sum of $2600 was owing on prior loans. Provision was made for the prompt repayment of these sums within a period of less than eleven weeks. Three payments were made, one in the sum of $500, one in the sum of $365 and one in the sum of $195. Possession was taken by the Bank at the expiration of the third week because of the failure to make the payments. No creditor acquired a lien upon the goods and the possession of the Bank was secured before the filing of the petition in involuntary bankruptcy. Surely on such a record it would be a harsh law that would defeat the Bank's

right to the property, or to the proceeds realized therefrom. The decree of the District Court should be reversed.

Respectfully submitted,

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